Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

DISCUSSION

European patients and African remedies

STEFAN SALOMON — 19 January, 2015

At the core is the question, what African customary laws might have to do with the politics of international law and international law itself? At the outset, I admit that the title chosen for this blog post is not entirely accurate. Africa does not provide the remedy for Europe or international law on the couch. But I am convinced that the most acute and fast paced global trends manifest more visibly in Africa than in other places: extraction without state mediation, wide scale (forced) human migration, flexible working conditions, radicalization of poverty, and the emergence, resilience or emphasis of normative orders other than law. The argument made is twofold. First, international law still operates upon processes of "othering", or, as Chikosa Silungwe puts it, of

declarations of 'not-knowledge'. Second, international law globalized as language, spoken by a heterogeneous many in different vernaculars. It is in these vernaculars that the Other comes to the fore and challenges basic assumptions of international law.

International Law and Absence

In general, international law deals with customary laws in states of rupture or incompleteness. As to the former, concepts of transitional justice employ customary laws to patch together a society torn apart by war and restore situation of normality as precondition for the operation of any legal system. Development assistance (promotion of rule of law and good governance), as an example for the latter, supports customary laws in areas where the formal legal system is either absent or not yet absorbed by the local population, mostly in rural not yet developed places. In this sense, rural is not a geographical space, but a category. In essence, these legal postulates represent another version of Sir Henry Maine's argument that every human society, as it develops from its premodern existence to modern society, equally develops its laws from custom to statute, from unwritten to written form, from status to contract. In this regard, international law entails a whole set of instruments how societies should look like (governance, market, society) and stipulates these as legal preconditions dissociated from the realm of negotiation.

Rupture and incompleteness circulate around the notion of absence. Translated into Hegelian terms, the African could never be an extension of myself, a projection of the self into the other, because s/he lacked reason. The origins of international law, as post-colonial scholarship has pointed

out, lie exactly here: in the contradistinction of the construction of the native, the perception of absence. Absence also implies that there is something to be done about, an empty space to be filled with rule of law, good governance and a human rights culture. It is in this sense that the global south, Africa in particular, is perceived as a place of deficiency, a space where new theories or concepts of international law can be tested and *not* as a body of knowledge.

International Law and Language

Despite, or rather precisely because of these declarations of absence, international law globalized: the bill of rights in the Nigerian constitution is modeled after the European Convention of Human Rights and the latter, in turn, is modeled after the Universal Declaration of Human Rights. The right related parts of constitutions – bill of rights, fundamental rights – globalized and are now similar, if not identical, to each other. Even if rights or legal status are not enshrined in a legally binding documents, such as indigenous peoples' rights, they are sometimes successfully claimed, as the Endorois decision of the African Commission on Human and Peoples' Rights shows. Whereas indigenous rights have a comparatively long history in the jurisprudence and civil society in the Americas, its African vernaculars illustrate the difference. In vast parts of Sub-Saharan Africa indigeneity is not a collective identity of marginalized groups, but rather a justification to discriminate against those who are not considered indigene to a place. Here, international law does not merely provide the language for contestation and struggle, but also creates subjectivities.

Customary Laws and Similarities

Virtually all African legal systems which recognize customary laws in one or another form also enshrine a repugnancy clause: customary laws have to be in conformity with *ordre public*, fundamental rights and, as the Nigerian Supreme Court held, 'values in the civilized international community'. The intricacy the courts face is obvious: an Igbo customary rule banning female's from inheriting their father's estate was recently invalidated on grounds of discrimination by the Nigerian Supreme Court , whereas a Bini customary rule on primogeniture (the right of the eldest son) to inherit the house of the deceased person was upheld. Furthermore, customary laws have to be living customary laws and not those of past times, as several African courts held. What the actual rules are, however, is often contested and claims implicitly formulated along lines of non-discrimination or cultural authenticity (right to culture). Anthropologists have repeatedly pointed out that customary laws are the field where economic, social and political structures of domination are embedded or contested. What is new, however, is that international law through its vernacular tropes provides the field of contestation and struggle.

But to reduce law to a mere instrument used by different actors at their will would miss the point. It is also a set of rules with its limits, a normative system that entitles, prohibits and claims superiority and unfolds its own logics. In a recent murder case before the Nairobi High Court the families of the victim and the accused agreed on the payment of *diya*, blood money, after the accused was arrested and brought before the court. Subsequently, the families relied on the constitutional provision proscribing due consideration of customary dispute resolution mechanisms – the inclusion of the provision a result of local

and international actors speaking the same language – to effect the release and acquittal of the accused.

Of course, all these moves bear their own specifities, tensions and double meanings. Nevertheless, it seems to me that great similarities to, say, demands for and resistance against the partial recognition of sharia law in Britain exist. It is precisely here where the Other comes to the fore. International lawyer's reflexive reference to sovereignty of the state as omnipotent lawgiver, its monopoly over law and violence, coherency of the legal system, merely repeat the assumption that there is harmony if we all got the right kind of rights. Instead, this reflexive behavior contributes to avoid discussion about the effects of international law.

A response to this post can be found here.

Stefan Salomon is currently Teaching and Research Fellow at the Institute of International Law and International Relations at the University of Graz.

ISSN 2510-2567

Tags: *Africa*, *Law and Society*, *Postcolonialism*

Related

Re: European Patients and African Remedies
21 January, 2015
In "Discussion"

No custom restricting state immunity for grave breaches – well why not?
11 December, 2014
In "Symposium"

A Pebble in the Shoe: Assessing International Uses of Do No Harm
15 October, 2014
In "Discussion"

PREVIOUS POST
Is civilian harm tracking a sensible idea?

NEXT POST
Re: European Patients and African Remedies

No Comment

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.